

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT VINCENT AND THE GRENADINES

SVGHCVAP2018/0007

BETWEEN:

PATRICIA ANNE HUGGINS

Appellant

and

LLOYD BROWNE

Respondent

Before:

The Hon. Mde. Louise Esther Blenman
The Hon. Mr. Paul Webster
The Hon. Mr. Gerard St. C. Farara,

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. Richard Williams with him, Ms. Danielle France for the Appellant
Ms. Suenel Fraser for the Respondent

2021: January 14;
June 14.

Civil appeal – Wasted costs – Non-compliance with court’s order – Rule 64.9 of the Civil Procedure Rules 2000 – Whether an appropriate case to impose a wasted costs order – Natural justice – Procedural fairness – Prior notice and reasonable opportunity to be heard before imposing a wasted costs order under rule 64.9(2) of the CPR – Whether prior notice and reasonable opportunity to be heard given to appellant

The appellant brought a claim against the respondent claiming damages and an injunction restraining the respondent from trespassing on her property. The respondent filed a defence and counterclaim and applied to strike out the statement of case alleging that it does not disclose a reasonable ground for bringing the claim. The learned judge heard the application on 21st February 2018 and directed the parties to file and serve skeleton arguments and authorities and to transmit electronic copies to the court by 2nd March 2018. The court also ordered that non-compliance with the order would attract wasted costs sanctions. The appellant was in court when the order was made. The legal practitioner for the appellant filed the skeleton argument by the stipulated date but did not send an electronic copy to the court.

On 21st March 2018 the judge delivered her decision on the strike out application. She noted that the legal practitioner for the appellant had not transmitted an electronic copy of the appellant's skeleton argument to the court and made a wasted costs order under rule 64.9 of the **Civil Procedure Rules 2000** (the "CPR"), against the appellant for her failure to transmit the submissions to the court in compliance with the order of 21st February 2018.

The appellant appealed contending that that the wasted costs order breached her natural justice rights because: (1) she was entitled to notice of the intended order and a reasonable opportunity to respond to it; (2) she not given a reasonable opportunity to be heard before the judge imposed the wasted costs order; and (3) this was not an appropriate case to impose a wasted costs order.

Held: allowing the appeal; setting aside the wasted costs order made against the appellant; and awarding costs of the appeal to the appellant summarily assessed at \$1,500.00, that:

1. A party whose interests or rights may be affected by the imposition of wasted costs order under CPR 64.9 should be given adequate notice to apprise himself of the case that he has to meet and a reasonable opportunity to be heard and to defend himself. In this case, there is no evidence that the appellant was aware of the non-compliance with the judge's order by her legal representative; that the court was minded to make a wasted costs order against her; and she was not given a reasonable opportunity to be heard. It follows that the appellant was not given a fair hearing and the wasted costs order was imposed against her in breach of the rules of natural justice.

Rule 64.9 of the Civil Procedure Rules, 2000 considered; **Gempride Limited v Jagrit Bamrah** [2018] EWCA Civ 1367 applied; **Halsbury's Laws of England** 5th edn. Vol. 61A (2018) considered.

2. Where the court finds that there is non-compliance with one of its orders, it must decide whether the non-compliance is sufficiently serious to impose a sanction under CPR 64.9. In this case, although the judge found that the appellant had failed to comply with the court's order, she did not proceed to consider whether the non-compliance was sufficiently serious for the appellant to be sanctioned by imposing a fine, resulting in a further breach of the appellant's right to a fair hearing.

Rule 64.9 of the Civil Procedure Rules 2000 considered; **Gempride Limited v Jagrit Bamrah & Anor** [2018] EWCA Civ 1367 applied.

JUDGMENT

- [1] **WEBSTER JA [AG.]:** This is an appeal against the order of the learned judge contained in paragraph 52(5) of the decision delivered on 21st March 2018 by which the judge made a wasted costs order under rule 64.9 of the **Civil Procedure Rules**

2000 (the “CPR”) against Ms. Patricia-Anne Huggins (“Ms. Huggins” or “the appellant”) for her failure to transmit electronic copies of her submissions and authorities to the court in compliance with the judge’s prior order made on 21st February 2018.

Background

- [2] On 4th January 2018, Ms. Huggins filed a claim in the court below against the respondent, Mr. Lloyd Browne (“Mr. Browne” or “the respondent”), for damages, costs and an injunction restraining the respondent and/or his servants or agents from trespassing on her property.
- [3] On 6th February 2018, Mr. Browne filed a defence and counterclaim. He also applied under rule 26.3(1)(b) of the CPR for an order that Ms. Huggins’ statement of case be struck out because it does not disclose a reasonable ground for bringing the claim (“the strike out application”).
- [4] The strike out application was heard on 21st February 2018 when the learned judge made the following orders:
- “1. Parties are to file and serve on or before 2nd March 2018 Skeleton Arguments and List of Authorities with the full text of the legal authorities relied on and transmit electronic copies to the court office on even date.
 2. Non-compliance with the timeline in this order will attract wasted cost sanctions.
 3. The Defendant has carriage of this order which must be filed on or before 2nd March 2018.” (“the Order”)
- [5] The legal practitioner for the appellant filed her skeleton arguments by the stipulated date but did not transmit an electronic copy to the court as required by paragraph 1 of the Order.
- [6] By a written decision dated 21st March 2018, the learned judge dismissed the strike out application and further ordered at paragraph 52(5) as follows:

“For her non-compliance with the court’s order to transmit electronic copies of her skeleton arguments and list of authorities to the court office on or before 2nd March 2018, Ms. Huggins shall on or before 5th April 2018 pay into the court office pursuant to CPR 64.9(2) wasted costs of \$500.00.”

The Appeal

- [7] On 5th April 2018, Ms. Huggins applied for leave to appeal against the wasted costs order and for a stay of execution. On 30th July 2018, the learned judge granted leave to appeal but dismissed the application for a stay of execution.
- [8] The notice of appeal lists seven grounds of appeal which I have distilled into the following issues which are all underpinned by the principles of natural justice:
- (i) whether the learned judge was required to give the appellant prior notice and a reasonable opportunity to be heard before imposing a wasted costs order under rule 64.9(2) of the CPR;
 - (ii) if so, was prior notice and a reasonable opportunity to be heard given to the appellant; and
 - (iii) in any case, was this an appropriate case to impose a wasted costs order on the appellant.

Submissions of Counsel

- [9] Learned counsel for the appellant, Mr. Richard Williams, contended that the wasted costs regime is compensatory in nature, designed to compensate a party who has incurred costs due to the opposing attorney’s improper, unreasonable or negligent conduct. Counsel maintained that though on a literal reading of the rule, a wasted costs order could be made against the litigant, this was improper. He submitted further, that even if the order was made against the attorney, the complaint still stands as it amounted to a fine being imposed by the judge and not a wasted costs order “in the proper sense”.

- [10] On the issue of natural justice, Mr. Williams submitted that the appellant was not given an opportunity to show why the wasted costs order should not be made against her, and her legal representative was only called upon to provide an explanation for her (the attorney's) failure to submit electronic copies of the submissions. This, Mr. Williams contended, disregards the principle of natural justice which provides that a person whose interests are to be affected by a decision should not be "condemned unheard". He took this Court to the transcript of proceedings to illustrate his point.¹
- [11] In response, learned counsel for the respondent, Ms. Suenel Fraser submitted that the alleged breach of natural justice is irrelevant in light of rule 42 of the CPR. She submitted that this is because: (i) under rule 42.9(b) of the CPR, an order of the court becomes effective immediately upon being pronounced in court unless varied by the court; (ii) the order was made in the presence of Ms. Huggins and her attorney who were both aware of the consequences of non-compliance; and (iii) no application for relief from sanctions was made.
- [12] Ms. Fraser also submitted that rule 64.9 of the CPR is a completely new regime that was introduced in 2011 to deal with lawyers and litigants who failed to comply with orders of the court. The judge's order made on 21st February 2018 was properly made pursuant to the powers given to the court by this rule.

Analysis

- [13] The central question that arises in this appeal is whether the learned judge erred in ordering wasted costs against the appellant for the failure to submit electronic copies of the skeleton arguments and authorities to the court. Before addressing this issue, I will make one general comment about wasted costs orders and then engage the question of the proper interpretation of the rules relating to wasted costs, namely, rules 64.9(1)(a) and 64.9(2)(b).

¹ Record of Appeal, e-pages 59-60. The relevant portion of the transcript is set out in paragraph 24 below.

[14] The rationale for giving the court the power to make wasted costs orders was expressed by Sir Thomas Bingham MR in **Ridehalgh v Horsefield**,² the leading authority on wasted costs. The Master of the Rolls stated:

“There can in our view be no room for doubt about the mischief against which these new provisions were aimed: this was the causing of loss and expense to litigants by the unjustifiable conduct of litigation by their or the other side's lawyers. Where such conduct is shown, Parliament clearly intended to arm the courts with an effective remedy for the protection of those injured.”³

The Master of the Rolls was referring to the courts' power in section 51 of the **Senior Courts Act 1981** (formerly the Supreme Court Act) to make wasted costs orders along the lines of what is now rule 64.8 of the CPR. His comments apply equally to the court's power under CPR 64.9 to impose a sanction for failing to comply with orders and directions of the court and for unreasonable or improper conduct by a party or his legal representative which I deal with below. Essentially, the court adopts a supervisory role in the conduct of proceedings to ensure that litigants are not financially prejudiced by unjustifiable conduct of legal practitioners (rule 64.8), and that the court's processes are respected and followed by practitioners and litigants (rule 64.9).

[15] The wasted costs regime is housed in part 64 of the CPR. Part 64 deals with general rules about costs. Wasted costs are dealt with in rules 64.8 and 64.9. Rule 64.8 reads:

“Wasted costs orders

(1) In any proceedings the court may by order –

- (a) direct the legal practitioner to pay; or
- (b) disallow as against the legal practitioner's client; the whole or part of any wasted costs.

(2) In this rule –

“wasted costs” means any costs incurred by a party –

- (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal practitioner or any employee of the legal practitioner; or

² [1994] Ch. 205.

³ Ibid at p. 231.

(b) which, in the light of any act or omission occurring after they were incurred; the court considers it unreasonable to expect that party to pay.”

[16] The object of part 64.8 is, as Mr. Williams submitted, compensatory. It compensates a party for any costs incurred because of the improper, unreasonable or negligent act or omission on the part of the adverse legal practitioner or an employee of the legal practitioner. Put another way, the incurring of additional but unnecessary costs is a pre-condition to the making of a wasted costs order under rule 64.8, and the rule is designed to compensate the affected party for having to incur unnecessary costs. Rule 64.8 does not apply to the conduct of the parties, only their legal representatives.

[17] Part 64.8 does not set out a procedure for making a wasted costs order; but this was not always the case. When the CPR came into force in 2000, rule 64.8 was worded as it is now, but it was followed by rule 64.9 in the following terms:

“Wasted costs orders – procedure

64.9 (1) This rule applies where –

- (a) an application is made for; or
- (b) the court is considering whether to make;
an order under rule 64.8 (1), except where 27.9 (6) applies.

(2) An application by a party must be on notice to the legal practitioner against whom the costs order is sought and must be supported by evidence on affidavit setting out the grounds on which the order is sought.

(3) If the court is considering making such an order court must give the legal practitioner notice of the fact that it is minded to make such an order.

(4) Notice under paragraph (3) must state the grounds on which the court is minded to make the order.

(5) A notice under paragraph (2) or (3) must state a date, time and place at which the legal practitioner may attend to show cause why the order should not be made.

- (6) The legal practitioner against whom the costs order is sought and all parties to the proceedings must be given 7 days notice of the hearing.”

This rule, now repealed, set out a procedure for a legal practitioner who was threatened with a wasted costs order to know the details of the allegation against him and gave him a reasonable opportunity to respond to the allegation. For reasons best known to the rule makers, rule 64.9 was repealed and replaced by what is now rule 64.9.

[18] The new rule 64.9 states:

“(1) The court may make an order under this Rule where –

- (a) a party or his legal representative, fails to comply with a Rule, practice direction or court order; or
- (b) it appears to the court that the conduct of a party or his legal representative, before or during the proceedings, was unreasonable or improper.

(2) Where paragraph (1) applies, the court may –

- (a) disallow all or part of the costs which are being assessed; or
- (b) order the party at fault or his legal representative to pay costs to the court or which he has caused any other party to incur; or both.

(3) Where –

- (a) the court makes an order under paragraph (2) against a legally represented party: and
- (b) the party is not present when the order is made, the party’s legal practitioner receives notice of the order.”

[19] This rule is fundamentally different from the rule that it replaced. The new rule removed the procedure for making a wasted costs order against a legal practitioner and replaced it with a rule that does not have a procedure for imposing or resisting a wasted costs order. Further, the new rule 64.9 seeks to sanction the conduct of the legal practitioner and the litigant. The net effect of the change was summarised by learned counsel Ms. Fraser, in paragraph 9 of her written submissions, as follows:

“Undoubtedly, this repeal and replacement was aimed at ensuring matters move swiftly along the procedural belt to completion, by penalizing the relevant stakeholders when they fail to comply with the rules, directions or orders, resulting in unnecessary delays or prolonging of matters.”

If this was the intention of the rule-makers, it has been achieved. The new rule 64.9 removed the procedural safeguards that were in the repealed rule 64.9 and gave the court a wide discretion to make a wasted costs order following such procedure as the court sees fit. The rules of procedural fairness are now implied into the procedure for making wasted costs orders.

[20] I note also that the new rule 64.9 introduced the power to impose a sanction for non-compliance that has nothing to do with wasted costs as defined in rule 64.8, or compensating a party for incurring such costs. This is the effect of the first limb of rule 64.9(2)(b) which empowers the court to order that the costs be paid into court. This is designed to punish a party or his legal representative who does not comply with a rule, practice direction or order, or who conducts himself in a manner that is unreasonable or improper, by imposing a monetary sanction. It begs the question why this part of rule 64.9 is housed in the wasted costs regime and under the rubric ‘Court’s powers in relation to wasted cost orders’, but that is an issue for the rule-makers, not the court. In the meantime, we should abide the wise counsel of Barrow JA in **Norgulf Holdings Limited et al v Michael Wilson & Partners Limited**⁴ when he cautioned that we should not be misled by (inaccurate) headings.

[21] I find some support for describing a rule 64.9 costs order as a sanction in the dictum of Hickinbottom LJ in **Gempride Limited v Jagrit Bamrah & Anor**⁵ where the learned Lord Justice compared the true wasted costs regime in Part 46.8 of the English Civil Procedure Rules (“the English CPR”) with rule 44.11, which is substantially the same as our rule 64.9 of CPR, and noted that:

“...The [wasted costs] jurisdiction is compensatory, and an applicant has to show a causal connection between the conduct of which complaint is made and the costs it seeks to have met or disallowed and is made against

⁴ BVICVAP2007/0008 (delivered 29th October 2005 (sic), unreported), at para. 6.

⁵ [2018] EWCA Civ 1367.

a legal representative...An order under CPR rule 44.11 can only be made against a party or a party's legal representative. The jurisdiction is not compensatory: it is not necessary to show that the applicant has suffered any loss as a result of the misconduct. It is a jurisdiction intended to mark the court's disapproval of the failure of a party or of a legal representative to comply with his duty to the court by way of an appropriate and proportionate sanction".

- [22] The imposition of a sanction, especially one involving the payment of money into court, is a serious matter that requires careful adherence to the principles of natural justice. The two basic rules of natural justice are explained briefly in **Halsbury's Laws of England**,⁶ as follows:

"There are two basic rules of natural justice. First, that no person is to be a judge in his or her own cause (*nemo iudex in causa sua*). **Second, that no one is to be condemned unheard (*audi alteram partem*)**. These rules govern the way in which a decision is taken rather than its correctness...The rules of natural justice must be observed by courts, tribunals, arbitrators and all those having the duty to act judicially save where their application is excluded expressly or by necessary implication, or by reason of other special circumstances". (emphasis mine)

- [23] From the above quotation, it is evident that a party whose interests or rights may be affected by the decision should be given adequate notice to apprise himself of the case that he has to meet and a fair and reasonable opportunity to be heard and to defend himself. It is uncontroverted that the wasted costs order of \$500.00 in this case has a direct bearing on Ms. Huggins because it was made against her personally. Having regard to the punitive nature of the rule, it is imperative that the principles of natural justice should have been followed. Ms. Huggins was in court on 21st February 2018 when the Order directing counsel to transmit the documents electronically was made and that a wasted costs order would be made if the Order was not obeyed. This constitutes notice to her of the consequences of a breach of the court's order. What appears to be missing in this case is that Ms. Huggins was not given an opportunity to give reasons or show cause why the wasted costs order should not be made against her. From my review of the transcript, she was not given a reasonable or any opportunity to respond to the intended order being made

⁶ Halsbury's Laws of England, 5th edn. Vol. 61A (2018).

against her. The relevant part of the transcript is at page 24 where the following exchange took place between counsel for the appellant and the learned judge:

The Court: Thank you. Is there any reason why it wasn't sent?
Transmitted?

Ms. France: I don't know, somebody else had the responsibility for it, so
I didn't realize it was not sent until now.

The Court: Okay, so the reason why (inaudible)?

Ms. France: Yes, My Lady it was just an oversight?

The Court: And you've wasted cost sanction (inaudible) how much you
considered to be an appropriate response?

Ms. France: My Lady, I do.

The Court: Okay, thank you very much. It's usually \$500.00..."⁷

- [24] Essentially, the brief exchange between counsel and the bench was to the effect that after being asked to provide a reason for the default, counsel stated that this was due to an oversight and thereafter the judge proceeded to make the wasted costs order against Ms. Huggins. The difficulty with this, in so far as it concerns the *audi alteram partem* principle, is that the order was not made against the legal representative. It was made against a litigant who was not engaged in the exchange between counsel and the bench, nor in the administrative functions of her attorney's law firm in not sending the electronic copy of the documents to the court. On 21st March 2018, Ms. Huggins went to court to receive the judge's decision on the strike out application. There is no evidence that she was aware of the non-compliance with the judge's order by her legal representative. Further, she was not given prior notice that the court was minded to make a wasted cost order against her, or a reasonable opportunity to be heard. This is particularly important in this case because the order that the judge made could not have been carried out by Ms. Huggins – it was entirely the responsibility of her attorney. She was entitled to assume that her attorney had complied with the judge's direction. The most that could be expected of her is that she could have made enquiries of the attorney about whether that the skeleton arguments had been transmitted to the court. The judge did not enquire of Ms. Huggins whether she had made any enquiries of her attorney or taken any other step to ensure that she had done what she was instructed to do

⁷ Record of Appeal, e-pages. 59-60.

by the court. It was not sufficient for the judge to have limited her enquiries to the attorney. The enquiries should have extended to finding out from the attorney what steps, if any, Ms. Huggins had taken to ensure compliance with the order. I am not surprised that this was not done because the reality of this case is that the default was entirely that of the attorney, and the sanction should have been directed at her and not her client.

[25] There is another reason why the breach of the *audi alteram partem* rule is relevant in this case. A finding of non-compliance with an order does not attract an automatic rule 64.9 sanction. The judge must still decide if the non-compliance is sufficiently serious to impose the sanction. The case of **Gempriede Limited v Jagrit Bamrah & Anor**,⁸ referred to above illustrates this point, but in a different context. The case turned on a consideration of the conduct by a solicitor that was “unreasonable and improper” within the meaning of rule 44.11 of the English CPR (rule 64.9(1)(b) the CPR). After discussing whether the solicitor’s conduct was unreasonable and improper, Hickinbottom LJ opined that, ‘[e]ven where the threshold criteria are satisfied, the court still has a discretion as to whether to make an order’.⁹ The allegation against Ms. Huggins in this appeal does not relate to misconduct within the meaning of rule 64.9, but to her failure to comply with the court’s order. A finding of non-compliance by Ms. Huggins is just a step in the process. The judge then has to decide whether the non-compliance was sufficiently serious for Ms. Huggins to be sanctioned. These steps were not taken by the learned judge in breach of appellant’s right to a fair hearing.

[26] My findings on what I have described as the central question in this appeal¹⁰ are that Ms. Huggins was entitled to prior notice that the court was minded to make a wasted costs order against her, and she should have been given a reasonable opportunity to respond to the charge or to explain the failure to comply with the 21st February 2018 order. Even if the learned judge had carried out these procedures

⁸ Supra n. 5.

⁹ Ibid at para. 22.

¹⁰ See paragraph 13 above.

and found Ms. Huggins in breach the Rules, she should have gone on to consider whether or not this was an appropriate case to make an order against the appellant. Learned counsel Mr. Williams has made out a case that the wasted costs order against the appellant was imposed in breach of the rules of natural justice. The order must be set aside.

- [27] This determination is sufficient to dispose of the appeal in its entirety and it is not necessary to consider Mr. Williams' argument on the merits that the learned judge acted *ultra vires* in making a wasted costs order pursuant to rule 64.9(2). I should also mention that I do not accept Ms. Fraser's submission that the effect of part 42.9 of the CPR is that once an order has been made it must be obeyed and cannot be challenged and that the rules of natural justice are irrelevant.¹¹ This case is a good example of how such an order can be challenged.

Conclusion

- [28] I would allow the appeal and set aside the order of the learned judge made at paragraph 52(5) of the decision dated 21st March 2018. The appeal was heavily contested, and the appellant was successful. Therefore, I would award her costs of the appeal, summarily assessed at \$1,500.00.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Gerard St. C. Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar

¹¹ See paragraph 11 above